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PRO SE APPELLANT:

**ALVA LESLIE FUNK**  
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

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Attorney General of Indiana

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Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ALVA LESLIE FUNK,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A02-0605-PC-382
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Thomas H. Busch, Judge  
Cause No. 79D02-0511-FC-99

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**April 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Alva Leslie Funk appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, Funk argues that the post-conviction court erred by denying his motion for an evidentiary hearing and erred by denying his claims of denial of counsel at the arraignment hearing, improper jury instruction, improper habitual offender information, improper sentencing under *Blakely v. Washington*, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. Concluding that the post-conviction court properly denied Funk's motion for an evidentiary hearing and properly denied post-conviction relief on Funk's claims of denial of counsel at the arraignment hearing, improper jury instruction, improper habitual offender information, improper sentencing under *Blakely v. Washington*, ineffective assistance of trial counsel, but that post-conviction court erred by failing to enter specific findings on Funk's ineffective assistance of appellate counsel claims, we affirm in part and reverse in part the post-conviction's denial of Funk's post-conviction petition and remand for specific findings on Funk's ineffective assistance of appellate counsel claims.

## **Facts and Procedural History**

The facts as reported in Funk's direct appeal are as follows:

The evidence most favorable to the verdict indicates that Funk and Glenda Stichter ("Stichter") attempted to escape from police in a white Cam[a]ro at very high speeds and with dangerous maneuvering of the vehicle. A detective saw Stichter, who had an outstanding arrest warrant, driving the white Cam[a]ro west on Salem Street. Funk was later identified as the passenger in the Cam[a]ro. The detective followed the Cam[a]ro in an unmarked police car.

The detective and other police officers planned to make a road block but the Cam[a]ro went into Tecumseh Park instead. The detective pursued the

Cam[a]ro into the park with lights and sirens. Another police car followed the Cam[a]ro into the park. The Cam[a]ro went through the park. The detective cut across a median to prevent the Cam[a]ro from exiting the park.

As the detective cut across the median, the Cam[a]ro came broadside at him. Funk reached down in his seat and pulled up a gun. He turned the gun towards the windshield of the detective's car. The detective laid down in his seat to avoid being shot. Funk then held the gun straight out the open window; he next pointed the gun at the second officer in pursuit. The Cam[a]ro then exited the park.

Meanwhile, several other police cars had arrived and tried to block the Cam[a]ro, without success. They followed the Cam[a]ro in a line and pursued it as it exited onto Interstate 65 South. After the Cam[a]ro exited onto State Road 25, it was hit on the passenger side by an oncoming car. Funk and Stichter were taken into custody. A gun containing four rounds of ammunition was discovered on the floorboard on the passenger side of the Cam[a]ro.

[Following a jury trial,] Funk was found guilty of two (2) counts of Intimidation While Armed With a Deadly Weapon, class C felonies; two (2) counts of Resisting Law Enforcement While Armed With a Deadly Weapon, class D felonies[;] one (1) count of Resisting Law Enforcement, a class A misdemeanor[;] three (3) counts of Criminal Recklessness While Armed With a Deadly Weapon, class D felonies[;] and being an Habitual Offender.

At sentencing, one (1) count of Criminal Recklessness While Armed With a Deadly Weapon and one (1) count of Resisting were merged into Count I, Intimidation While Armed With a Deadly Weapon. One (1) count of Resisting Law Enforcement While Armed With a Deadly Weapon and one (1) count of Criminal Recklessness While Armed With a Deadly Weapon were merged into Count III, Intimidation While Armed With a Deadly Weapon. One (1) count of Criminal Recklessness While Armed With a Deadly Weapon was merged into Count VI, Resisting Law Enforcement. Funk was sentenced to eight (8) years for Count I, Intimidation While Armed With a Deadly Weapon, eight (8) years for Count III, Intimidation While Armed With a Deadly Weapon, and one (1) year on Count VI, Resisting Law Enforcement, all to run consecutively. Count I was enhanced by thirty (30) years because of Funk's status as an habitual offender.

Appellant's App. p. 235-37; *Funk v. State*, No. 79A04-9307-CR-249, slip op. at 2-4 (Ind. Ct. App. Dec. 12, 1994). Thus, Funk received an aggregate sentence of forty-seven years.

In July 1993, Funk, by counsel, filed a direct appeal to this Court and argued that: (1) the trial court erred by denying his motion for continuance filed at the beginning of trial; (2) he received ineffective assistance of trial counsel;<sup>1</sup> (3) the trial court erred by denying his motion for change of venue; (4) the evidence was insufficient to support his convictions; and (5) his sentence was manifestly unreasonable. In an unpublished memorandum decision of December 12, 1994, this Court affirmed Funk's convictions and sentence. Funk filed a petition to transfer, which the Indiana Supreme Court denied on January 18, 1995.

In February 1995, Funk filed a motion to correct erroneous sentence, alleging that he had been erroneously sentenced on Counts I and III because the charging information, jury verdict forms, and abstract of judgment referred to intimidation "while armed" with a deadly weapon instead of "draws or uses" a deadly weapon as stated in the intimidation statute. *See* Ind. Code § 35-45-2-1(b)(2). Funk also filed a motion for an evidentiary hearing. The trial court denied both of Funk's motions. Funk appealed to this Court, and we affirmed the trial court's denial of Funk's motion to correct erroneous sentence and motion for a hearing. *See Funk v. State*, 714 N.E.2d 746, 751 (Ind. Ct. App. 1999), *reh'g denied, trans. denied*.

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<sup>1</sup> Funk raised the following five allegations of ineffective assistance of trial counsel: (1) failure to lay a proper foundation for the admission of impeachment evidence; (2) failure to lay a proper foundation for the admission of substantive evidence; (3) failure to interview and depose a witness who was unavailable for trial due to military duty; (4) failure to draft an adequate motion to continue; and (5) failure to rehabilitate a defense witness whose credibility was impeached by the State.

In November 1997, Funk filed a petition for post-conviction relief, which he later moved to withdraw without prejudice in March 2001 after the deputy from the Indiana Public Defender's Office withdrew her appearance. The trial court granted Funk's motion to withdraw. Then, in September 2005, Funk filed another post-conviction petition for relief, in which he alleged that: (1) he was denied counsel at the arraignment hearing; (2) the trial court improperly instructed the jury on accomplice liability; (3) the habitual offender information—which alleged that Funk had accumulated “at least four (4) prior unrelated felony convictions—was fatally defective because the language “at least” did not track the language of the habitual offender statute and did not allow him to prepare a defense;<sup>2</sup> (4) the habitual offender information, which was amended on the day of the habitual offender phase of the trial, was improperly amended because the amendment was not reflected in the chronological case summary and because he was not given notice of the amendment or a chance to contest it; (5) the trial court denied him the defense of laches in the habitual offender phase of the trial; (6) his habitual offender enhancement was improper because the trial court did not use the amended habitual offender statute, which was effective July 1, 1993, during his April 1993 sentencing hearing; (7) his trial counsel was ineffective for failing to object or raise the errors alleged in (1)-(6); (8) his appellate counsel was ineffective for failing to raise issues (1), (5), and (6) on appeal and ineffective for failing to raise issues (2)-(4) under the ineffective assistance of trial counsel argument on appeal; (9) his post-conviction counsel, who withdrew from his previously filed post-conviction petition, was ineffective

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<sup>2</sup> Funk's amended habitual offender information alleged that he had been convicted of the following Class D felonies: (1) entering to commit a felony in 1960; (2) unlawful entry into a vehicle in 1977; (3) theft in 1980; and (4) escape in 1980.

because she had informed him that the issues raised in his previous post-conviction petition had no merit; and (10) he was improperly sentenced pursuant to *Blakely v. Washington*. Appellant's App. 104-156, 196.

The post-conviction court appointed the Indiana Public Defender's Office to represent Funk. Funk filed a motion for change of judge, alleging that he intended to call the post-conviction judge as a witness. The post-conviction court granted Funk's motion for change of judge in October 2005. In December 2005, pursuant to a request by Funk, the deputy from the Indiana Public Defender's Office filed her motion to withdraw her appearance, and the post-conviction court granted the motion. The post-conviction court then ordered the parties to proceed by affidavit pursuant to Indiana Post-Conviction Rule 1(9)(b).<sup>3</sup> Funk submitted his own affidavit and supporting exhibits, but he did not submit any affidavits from his trial or appellate counsel and did not request the issuance of subpoenas for any witnesses as allowed by Indiana Post-Conviction Rule 1(9)(b). The State filed a response to Funk's post-conviction petition and a motion, in which it

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<sup>3</sup> Indiana Post-Conviction Rule 1(9)(b) provides:

In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena. Petitioners who are indigent and proceeding in forma pauperis shall be entitled to production of guilty plea and sentencing transcripts at public expense, prior to a hearing, if the petition is not dismissed. In addition, such petitioners shall also be entitled to a record of the post-conviction proceeding at public expense for appeal of the denial or dismissal of the petition.

informed the post-conviction court that it would not be submitting affidavits and asked the court to, instead, take judicial notice of the entire record surrounding Funk's underlying cause. Funk filed a motion for an evidentiary hearing, which the post-conviction court denied.

In April 2006, the post-conviction court then issued an order denying post-conviction relief to Funk. Specifically, the post-conviction court's order provided:

[Funk's] petition for post-conviction relief is denied to the extent that it raises issues that could have been raised on appeal, including:

- I. Denial of counsel at arraignment,
- II. Failure to properly instruct the jury,
- III. Defects in the habitual criminal information,
- IV. Failure to amend the habitual criminal information,
- V. Failure to permit the defense of laches with respect to the habitual offender proceedings,
- VI. Arguing for retroactive application of an ameliorative amendment to the sentencing statutes enacted subsequent to defendant's sentence, but prior to his appeal, and
- VII. Ineffective assistance of trial counsel.

There is no argument based upon new facts or matters outside the record contained in the argument concerning ineffective assistance of trial counsel. Rather, all these arguments repeat the first six points already denied by this Court.

The Court also denies [Funk's] petition for post-conviction relief to the extent it raises the issue of ineffective assistance of appellate counsel and ineffective assistance of post-conviction counsel, issues VIII and IX. Once again, these points simply rehash the points that [Funk] argues should have been argued on his appeal. The Court finds that no error has been raised that was not presented on direct appeal. The Court notes that [Funk's] trial has been analyzed by appellate counsel and the Public Defender's Office; [Funk's] motion to correct an erroneous sentence has been denied, and that denial has been affirmed on appeal; and the State Public Defender has reviewed [Funk's] record in the context of assisting the defendant with his first post-conviction relief petition and found no basis for going forward.

Finally, [Funk's] argument under *Blakely v. Washington*, issue X, is denied, because *Blakely* does not apply retroactively. The Court therefore denies [Funk's] petition for post-conviction relief.

*Id.* at 20-21. Funk now appeals.

### **Discussion and Decision**

Before addressing Funk's claims of error, we note the general standard under which we review the denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.*

We also note that the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

Funk argues that the post-conviction court erred by: (1) denying his motion for an evidentiary hearing; (2) finding that he had waived his post-conviction issues (1)-(4)

because they could have been raised on direct appeal;<sup>4</sup> (3) denying relief on his claims relating to ineffective assistance of trial counsel; (4) denying relief on his *Blakely* sentencing claim; and (5) denying him relief on his ineffective assistance of appellate counsel claim. We will address each in turn.

## **I. Evidentiary Hearing**

Funk contends that the post-conviction court abused its discretion by denying his request for an evidentiary hearing. We review a post-conviction court's decision to forego an evidentiary hearing when affidavits have been submitted under Indiana Post-Conviction Rule 1(9)(b) under an abuse of discretion standard. *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005) (citing *Fuquay v. State*, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997), *trans. denied*), *trans. denied*.

Here, following the withdrawal of appearance of the deputy from the Indiana Public Defender's Office, the post-conviction court ordered the parties to proceed by affidavit pursuant to Indiana Post-Conviction Rule 1(9)(b), which provides, in part, that “[i]n the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit.” Funk then submitted his own affidavit and exhibits, but he did not submit any affidavits from his trial or appellate counsel and did not submit any subpoenas for witnesses. Funk also filed a motion for an evidentiary hearing. The State informed the post-conviction court that it would not be submitting affidavits and asked the court to take judicial notice of the entire record surrounding Funk's underlying cause.

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<sup>4</sup> Funk makes no argument regarding his post-conviction claim (5) (regarding a denial of the defense of laches in the habitual offender phase of the trial) or claim (6) (regarding sentencing under the amended habitual offender statute).

The post-conviction court denied Funk's motion for an evidentiary hearing and then denied his petition for post-conviction relief.

Funk cites to *Evolga v. State*, 722 N.E.2d 370 (Ind. Ct. App. 2000), and argues that the post-conviction court should have granted his motion for an evidentiary hearing because he raised ineffective assistance of counsel claims, which involve issues of fact. Funk requests that we remand this case to the post-conviction court for a "full and fair evidentiary hearing" and that he be allowed to call his trial counsel, appellate counsel, and presiding trial court judge as witnesses at the hearing. Appellant's Br. p. 28. We will not do so.

In *Evolga*, the petitioner filed a petition for post-conviction relief, alleging, in part, that he was denied the effective assistance of counsel. *Evolga*, 722 N.E.2d at 371. The State filed an unverified general denial, and neither party submitted affidavits or evidentiary material. *Id.* at 373. The post-conviction court summarily denied the petitioner's post-conviction petition. *Id.* at 372. On appeal, we cited to Indiana Post-Conviction Rule 1(4)(g), which provides, in part, that a post-conviction court "shall" hold an evidentiary hearing if "an issue of material fact is raised[.]" and stated that under this post-conviction rule, the proper inquiry, with respect to the petitioner's ineffective assistance of counsel claim, was not whether the petitioner's counsel was in fact effective or adequate; rather, the question was whether there existed a genuine issue of material fact as to the effectiveness or adequacy of the petitioner's counsel. *Id.* at 373. We concluded that the post-conviction court had erred by summarily disposing of the petitioner's post-conviction petition because "the effectiveness of *Evolga*'s counsel was a

question of fact precluding summary disposition of a petition for post-conviction relief.”  
*Id.*

Our case is similar to *Smith v. State*. In *Smith*, the petitioner filed his *pro se* post-conviction petition, alleging that his trial counsel was ineffective, and the post-conviction court, pursuant to Indiana Post-Conviction Rule 1(9)(b), directed the parties to submit affidavits in support of and in opposition to the petition. 822 N.E.2d at 197. The petitioner then filed his own affidavit in support of his petition, but he did not request the issuance of subpoenas for witnesses. *Id.* at 198, 201-02. The State submitted affidavits of the petitioner’s three trial attorneys. *Id.* at 198. The petitioner filed a motion to set an evidentiary hearing, and the post-conviction court denied the motion and denied the petitioner’s motion for post-conviction relief. *Id.*

On appeal, the petitioner argued that the post-conviction court erred by denying his request for an evidentiary hearing because his affidavit presented factual issues regarding whether his trial counsel rendered ineffective assistance, which, consequently, required an evidentiary hearing under Indiana Post-Conviction Rule 1(4)(g). *Id.* We disagreed and stated that Indiana Post-Conviction Rule 1(4)(g) did not apply in the petitioner’s case, where the post-conviction court had ordered the parties to proceed by affidavit under Indiana Post-Conviction Rule 1(9)(b).<sup>5</sup> *Id.* at 198-201. We explained that:

Factual statements in affidavits often raise issues of fact, and to require a full evidentiary hearing any time affidavits submitted under Rule 1(9)(b) create issues of fact would defeat the purpose of Rule 1(9)(b), which is to

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<sup>5</sup> Also, we noted that we disagreed with our prior decision in *Hamner v. State*, 739 N.E.2d 157 (Ind. Ct. App. 2000) “to the extent that it conflated” summary disposition under Indiana Post-Conviction Rule 1(4)(g) and Indiana Post-Conviction Rule 1(9)(b). *Smith*, 822 N.E.2d at 201.

allow for more flexibility in both the presentation of evidence and the review of post-conviction claims where the petitioner proceeds pro se. Accordingly, where the PCR court orders the parties to proceed by affidavit under Rule 1(9)(b), the court may also determine that the petitioner's personal presence at an evidentiary hearing is required. But we hold that the decision whether to hold an evidentiary hearing for a "full and fair determination of the issues raised," like the decision to proceed by affidavit, is best left to the PCR court's discretion. Rule 1(4)(g), concerning summary disposition, has no bearing on the matter. Instead, consistent with our holding in *Fuquay*, 689 N.E.2d at 486, we will review the PCR court's decision to forego an evidentiary hearing when affidavits have been submitted under Rule 1(9)(b) under an abuse of discretion standard.

*Id.* at 201.

We then concluded that the post-conviction court did not abuse its discretion by not holding an evidentiary hearing on the petitioner's post-conviction petition because "other than claiming that the affidavits [the petitioner] and the State submitted raised issues of fact, [he] ha[d] failed to show how an evidentiary hearing would have aided him." *Id.* We noted that the petitioner had only made general assertions that he was denied an opportunity to present unidentified witnesses in support of his ineffective assistance of counsel claim and explained that if the petitioner believed that there were witnesses to support his claims, he could have either submitted affidavits from those witnesses or followed the procedure set forth under Rule 1(9)(b) and requested that such witnesses be subpoenaed.<sup>6</sup>

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<sup>6</sup> We noted that we disagreed with the suggestion in *Hamner* that there is no express time limit in Indiana Post-Conviction Rule 1(9)(b) for a petitioner to file an affidavit setting forth the names and expected testimony of witnesses he wants to subpoena and that a petitioner could request a hearing and then "wait and see" before filing the required affidavits under the rule. *Smith*, 822 N.E.2d at 202 n.5. Specifically, we disapproved of *Hamner* to the extent that it encouraged petitioners in an Indiana Post-Conviction Rule 1(9)(b) situation to ask for an evidentiary hearing without following the proper procedure for requesting the issuance of subpoenas for particular witnesses, and then argue on appeal—without ever having identified certain witnesses and their expected testimony to the post-conviction court—that they were denied a full and fair determination of the issues. *Id.*

Here, like the petitioner in *Smith*, Funk argues that the post-conviction court should have held an evidentiary hearing because his affidavit raised factual issues regarding his ineffective assistance of counsel claims and that the post-conviction court was obligated under Indiana Post-Conviction Rule 1(4)(g) to hold an evidentiary hearing. However, like in *Smith*, the post-conviction court ordered the parties to proceed by affidavit under Indiana Post-Conviction Rule 1(9)(b). Thus, Indiana Post-Conviction Rule 1(4)(g) had no bearing on the post-conviction court's decision on whether to grant or deny Funk's motion for evidentiary hearing when affidavits had been submitted under Indiana Post-Conviction Rule 1(9)(b). *See Smith*, 822 N.E.2d at 201. Funk has only presented general assertions that he was denied an opportunity to present his trial counsel, appellate counsel, and the presiding trial judge as witnesses in support of his ineffective assistance of counsel claim. However, if Funk believed that these witnesses would have supported his claims, he could have either submitted affidavits from those witnesses or followed the procedure set forth under Indiana Post-Conviction Rule 1(9)(b) and requested that such witnesses be subpoenaed. *See Ind. Post-Conviction Rule 1(9)(b)* (providing that a pro se petitioner who requests issuance of a subpoena for a witness at an evidentiary hearing "*shall* specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony") (emphasis added). Because Funk would not have been entitled to have his counsel and the trial judge testify at the evidentiary hearing, he has failed to show how an evidentiary hearing would have aided him. Therefore, we conclude that the post-conviction court did not abuse its

discretion by denying Funk's motion for an evidentiary hearing.<sup>7</sup> *See, e.g., Smith*, 822 N.E.2d at 201-02; *Fuquay*, 689 N.E.2d at 486 (holding that the post-conviction court did not err by denying the petitioner's motion for an evidentiary hearing and by proceeding by affidavit).

## II. Waived Claims

Funk argues that the post-conviction court erred by finding that his post-conviction issues (1)-(4) could have been raised on direct appeal. Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *reh'g denied*. It is well established that the post-conviction process allows a petitioner to raise challenges that were not known at the time of the original trial or available at the time of the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *reh'g denied*. These proceedings do not substitute for direct appeals but provide a narrow remedy for subsequent collateral challenges to convictions. *Id.* Issues that were known and available but not raised on direct appeal are waived and, thus, are unavailable for post-conviction review. *Id.*

Funk raises claims of denial of counsel at an arraignment hearing, improper jury instruction, and the propriety of the habitual offender information. *See* Appellant's Br. p. 7-24. Specifically, he argues that: (1) he was denied counsel at the arraignment hearing; (2) the trial court improperly instructed the jury on accomplice liability; (3) the habitual

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<sup>7</sup> The State agreed with Funk that the post-conviction court improperly denied relief on Funk's ineffective assistance of appellate counsel claim without holding an evidentiary hearing based on cases such as *Hamner* and *Evolga*. However, as explained above, these cases—which applied Indiana Post-Conviction Rule 1(4)(g)—are not germane to the issue of whether the post-conviction court abused its discretion to forego an evidentiary hearing when affidavits have been submitted under Indiana Post-Conviction Rule 1(9)(b).

offender information—which alleged that Funk had accumulated “at least four (4) prior unrelated felony convictions—was fatally defective because the language “at least” did not track the language of the habitual offender statute and did not allow him to prepare a defense; (4) the habitual offender information, which was amended on the day of the habitual offender phase of the trial, was improperly amended because the record does not show that it was amended and because he was not given notice of the amendment or a chance to contest it. Funk did not raise any of these allegations of error on direct appeal. *See Funk*, slip op. at 2-14; Appellant’s App. p. 235-47.

Based on Funk’s arguments regarding these claims, it is clear that all of these claims were known and available but not raised on direct appeal. Thus, they are waived and are unavailable for post-conviction review. *See Ben-Yisrayl*, 738 N.E.2d at 258. Furthermore, to the extent that Funk argues that these claims are available for review as claims of fundamental error, we disagree. Freestanding allegations of fundamental error are not available in post-conviction proceedings. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002) (citing *Canaan v. State*, 683 N.E.2d 227, 235 n.6 (Ind. 1997), *reh’g denied*). Accordingly, we conclude that the post-conviction court’s denial of Funk’s petition for post-conviction relief on these claims is not erroneous. *See, e.g., Stevens*, 770 N.E.2d at 761 (holding that the petitioner’s claims that were available but not presented on direct appeal could not be asserted as post-conviction claims).

### **III. Ineffective Assistance of Trial Counsel Claims**

Funk contends that the post-conviction court erred by denying relief on his claims relating to ineffective assistance of trial counsel. Funk argues that his trial counsel was ineffective for failing to object to the errors raised in his post-conviction issues (1)-(4).

Our Indiana Supreme Court has explained that a defendant who raises a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from subsequently relitigating that claim. *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *reh’g denied*. Specifically, “ineffective assistance of trial counsel is not available in post[-]conviction if the direct appeal raises any claim of deprivation of Sixth Amendment right to counsel.” *Id.*

Here, Funk raised ineffective assistance of trial counsel claims on direct appeal. *See Funk*, slip op. at 6-10; Appellant’s App. p. 239-43. Thus, Funk may not, once again, argue ineffectiveness of his trial counsel when he already presented that argument on direct appeal. *See Woods*, 701 N.E.2d at 1220; *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (“It has long been the rule that a defendant who raises a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from subsequently relitigating that claim.”), *reh’g denied*. Accordingly, the post-conviction court properly denied Funk post-conviction relief on his ineffective assistance of trial counsel claims.

### **IV. Blakely Sentencing Claim**

Next, Funk argues that the post-conviction court erred by denying post-conviction relief on his *Blakely* sentencing claim. Specifically, Funk contends that we should retroactively apply *Blakely* to his sentencing because his “trial and appellate counsels

argued and objected to his sentence at every stage of the proceedings so this issue should be preserved and this Court should revisit this issue.” Appellant’s Br. p. 29.

The Indiana Supreme Court has explained that *Blakely* applies retroactively to cases pending on direct review or not yet final at the time that *Blakely* was announced. *Smylie v. State*, 823 N.E.2d 679, 687 (Ind. 2005), *cert. denied*, 126 S. Ct. 545 (2005). In addition, the *Smylie* Court explained that “[t]he fundamental error doctrine will not . . . be available to attempt retroactive application of *Blakely* through post-conviction relief.” *Id.* at 689 n.16.

Here, the opinion from Funk’s direct appeal was issued on December 12, 1994, and the opinion was certified on January 18, 1995. More than nine years later, the United States Supreme Court decided *Blakely* on June 24, 2004. Because it is clear that Funk’s case was not pending on direct review and was final, the holding in *Blakely* was not available to him. Accordingly, the post-conviction court properly denied Funk post-conviction relief on this issue.

#### **V. Ineffective Assistance of Appellate Counsel**

Funk contends that the post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of appellate counsel. In addressing this claim, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh’g denied, cert. denied*, 531 U.S. 1128 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the

deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*, *cert. denied*, 534 U.S. 830 (2001)). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). To satisfy the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Failure to satisfy either prong will cause the claim to fail. *Id.*

Ineffective assistance claims at the appellate level of proceedings generally fall into three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *See Bieghler v. State*, 690 N.E.2d 188, 193-195 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). Funk's claims of appellate counsel's ineffectiveness are based on the second and third categories. Funk contends that his appellate counsel was ineffective for: (1) failing to present issues on his direct appeal—specifically, that he was denied counsel at the arraignment hearing and that his habitual offender enhancement was improper because the trial court did not use the amended habitual offender statute, which was effective July 1, 1993, during his April 1993 sentencing hearing (post-conviction issues (1) and (6)); and (2) failing to present his ineffective assistance of trial counsel issue competently on appeal—specifically, that appellate counsel failed to argue that trial counsel was ineffective for failing to object to the accomplice liability jury instruction, the State's habitual offender charging

information, and the State's amendment of the habitual offender charging information (post-conviction issues (2)-(4)).

When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, a defendant must overcome the strongest presumption of adequate assistance. *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), *trans. denied*. In determining whether appellate counsel's performance was deficient, we consider the information available in the trial record or otherwise known to appellate counsel. *Id.* To prevail upon the claim of ineffective assistance of appellate counsel, the petitioner must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Id.*

When the issue of ineffective assistance of appellate counsel is based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel, the petitioner faces a compound burden. *Id.* Petitioner must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id.* The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id.*

Here, the post-conviction court denied Funk relief on his ineffective assistance of appellate counsel claims, concluding that his contentions of appellate counsel ineffectiveness "simply rehash[ed] the points that [Funk] argue[d] should have been

argued on his appeal” and “finding that no error ha[d] been raised that was not presented on direct appeal.” Appellant’s App. p. 21. However, the allegations of ineffective assistance of appellate counsel—which, as noted above, were based on issues not raised on direct appeal and on allegations of ineffective assistance of trial counsel not raised on direct appeal—were not presented on direct appeal. Although Funk’s claims of ineffective assistance of trial counsel were precluded from being raised at the post-conviction level because he had already raised an ineffective assistance of trial counsel issue on direct appeal, that did not mean that his claim of ineffective assistance of appellate counsel based upon a failure to raise those alleged errors also failed. *See McCary*, 761 N.E.2d at 392-95 (reviewing the petitioner’s claim of ineffective assistance of appellate counsel where his claim of ineffective assistance of trial counsel was barred by *res judicata*); *Seeley*, 782 N.E.2d at 1060 (noting that “our Supreme Court did not intend to preclude claims of ineffective assistance of appellate counsel when claims of ineffective assistance of trial counsel are precluded”).

Therefore, the post-conviction court should have addressed the merits of Funk’s ineffective assistance of appellate counsel claim. Indeed, Indiana Post-Conviction Rule 1(6) provides, in relevant part, that “[t]he court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held.” Because the post-conviction court did not review the specific allegations underlying Funk’s claims of ineffective assistance of appellate counsel, we remand to the post-conviction court to

enter specific findings of fact and conclusions of law addressing Funk's ineffective assistance of appellate counsel issue as required by Indiana Post-Conviction Rule 1(6).<sup>8</sup>

In summary, we conclude that the trial court did not abuse its discretion by denying Funk's motion for an evidentiary hearing. Also, we affirm the post-conviction court's denial of post-conviction relief on Funk's freestanding claims of denial of counsel at the arraignment hearing, improper jury instruction, improper habitual offender information, improper sentencing under *Blakely*, and ineffective assistance of trial counsel. Finally, we remand this case to the post-conviction court for the entry of specific findings of fact and conclusions of law on Funk's ineffective assistance of appellate counsel claim.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and BARNES, J., concur.

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<sup>8</sup> The State concedes that this case needs to be remanded to the post-conviction court for them to enter findings of fact and conclusions of law as required by Indiana Post-Conviction Rule 1(6) on Funk's claims of ineffective assistance of appellate counsel only. *See* Appellee's Br. p. 7-8.